

21

AUG 25 1997

CLERK

In The

# Supreme Court of the United States

October Term, 1997

Hon. Thomas R. Phillips, Hon. Raul A. Gonzalez, Hon. Jack Hightower,  
Hon. Nathan L. Hecht, Hon. Lloyd Doggett, Hon. John Cornyn, Hon.  
Bob Gammage, Hon. Craig T. Enoch, Hon Rose Spector, Texas Equal  
Access to Justice Foundation, and W. Frank Newton, in his Official  
Capacity as Chairman of the Texas Equal Access to Justice Foundation,  
*Petitioners*

v.

Washington Legal Foundation, William R. Summers, and Michael J.  
Mazzone,  
*Respondents*

*On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Fifth Circuit*

## Motion for Leave to File Amicus Brief

Henry C. Dinger, P.C.  
GOODWIN, PROCTER & HOAR LLP  
Exchange Place  
Boston, Massachusetts 02109  
(617) 570-1000

Counsel for the Massachusetts Bar  
Foundation, amicus curiae

4 PP

The Massachusetts Bar Foundation ("MBF") moves this Court for leave, *nunc pro tunc*, to file an amicus brief in support of petitioners. MBF filed an amicus brief on August 25, 1997, pursuant to Supreme Court Rule 37.3, on the understanding that both petitioners and respondents had consented to that filing. Counsel for MBF had obtained the consent of the counsel of record for both petitioners and respondents. MBF's counsel was subsequently advised by respondent Michael J. Mazzone, a respondent representing himself *pro se* in this case, that he did not consent to MBF's submission of an amicus brief in support of petitioners. The only reason that Mr. Mazzone gave for his refusal to consent was that MBF had earlier declined to consent to his filing an amicus brief in another case.

*Reasons for Granting Leave to File Amicus Brief*

The instant case presents the issue whether the Texas Interest on Lawyers' Trust Accounts ("IOLTA") program constitutes an unconstitutional taking of property in violation of the Fifth and Fourteenth Amendments to the Constitution. MBF, and the non-profit organizations in Massachusetts that MBF supports, have a vital interest in the resolution of this issue.

The MBF is a charitable corporation established in 1964 as the charitable arm of the Massachusetts Bar Association, the principal statewide organization of lawyers practicing in the Commonwealth of Massachusetts.

In 1985, the Massachusetts Supreme Judicial Court established an IOLTA program in Massachusetts that permitted lawyers to pool short-term and nominal client funds entrusted to their custody into interest-bearing accounts with the interest payable to certain organizations, including MBF, that fund legal services for indigents and programs for improving the administration of justice. *See generally* *Petition of Massachusetts Bar Association*, 395 Mass. 1, 478 N.E.2d

715 (1985). The Court later required all Massachusetts lawyers to use IOLTA accounts for such client funds.

MBF currently is responsible for allocating approximately one-quarter of the funds raised by the Massachusetts IOLTA program, nearly \$2 million in 1996. In Massachusetts, IOLTA funds not only traditional legal services programs for the benefit of people unable to afford representation (in divorce cases, landlord-tenant disputes, and the like) but also programs designed to enhance the administration of justice. Recent grant recipients have included several mediation and other alternative dispute resolution programs that have the effect of reducing congestion in Massachusetts courts, as well as programs providing coordination and support for "lawyer for a day" and other pro bono projects that assist pro se litigants and other unrepresented persons. The Flaschner Judicial Institute, an organization dedicated to providing continuing education programs for judges in Massachusetts, receives a significant portion of its funding from the Massachusetts IOLTA program.

In 1991, respondent, Washington Legal Foundation, and several individuals brought suit in the United States District Court for the District of Massachusetts against the Supreme Judicial Court, the MBF and other parties involved in the Massachusetts IOLTA program challenging the constitutionality of that program on grounds essentially identical to those raised here. The First Circuit affirmed the dismissal of those claims, finding that the IOLTA program neither took the property of Massachusetts lawyers or their clients in violation of the Fifth Amendment, nor infringed their rights under the First Amendment. *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962 (1st Cir. 1993).

MBF has a direct interest in this case because the Texas IOLTA program in many respects is similar to the Massachusetts program and a decision by this Court upholding the Fifth Circuit's conclusion that the former is unconstitutional may pose a direct threat to the Massachusetts program.

If the Massachusetts IOLTA program is invalidated in its current compulsory form, the resources available to advance the common goals of MBF and the IOLTA program will be dramatically reduced. It was for this reason that MBF submitted an amicus brief in the Fifth Circuit in this case, and now seeks to do so before this Court.

MBF shares with this Court a passionate commitment to "equal justice under law," as well as a deep concern for improving the administration of justice in state and federal court systems. In this age of diminished public funding of legal services and the judiciary, the IOLTA program is an essential part of achieving these goals.

#### *Conclusion*

For the foregoing reasons, MBF asks that this Court grant leave, *nunc pro tunc*, for the submission of its amicus brief filed on August 25, 1997.

Respectfully submitted,

---

Henry C. Dinger, P.C.  
GOODWIN, PROCTER & HOAR LLP  
Exchange Place  
Boston, MA 02109  
(617) 570-1000

*Counsel for the Massachusetts Bar  
Foundation, amicus curiae*